

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CACR06-834

June 27, 2007

JEIGHMICHAEL S. DAVIS
APPELLANT

AN APPEAL FROM BRADLEY
COUNTY CIRCUIT COURT
[CR2005-35-1]

V.

HON. SAM POPE, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED; MOTION TO
WITHDRAW IS GRANTED

On January 10, 2006, a Bradley County jury found Jeighmichael Davis guilty of aggravated robbery and sentenced him to a fifteen-year term in the Arkansas Department of Correction. His attorney has filed a motion to withdraw as appellant's counsel. The motion was accompanied by a no-merit brief, pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Ark. Sup. Ct. R. 4-3(j), wherein counsel contends that all rulings adverse to his client are abstracted and discussed. Appellant has filed no pro se points for reversal. After reviewing the record, we hold that an appeal in this case would be wholly without merit. Accordingly, we affirm appellant's conviction and grant counsel's motion to withdraw.

On March 18, 2005, a masked man robbed a Pizza Hut in Warren, taking \$180. The store manager could not identify the robber. However, appellant's mother, Felecia Childs,

went to the Warren Police Department with a mask that she found in appellant's bedroom. She told Lieutenant Shaun Hildreth that she heard about the robbery and thought her son might have been involved. The manager of the Pizza Hut identified the mask as the one worn by the robber. Later that day, police went to Childs's residence, and Childs gave police consent to search her home. While at the home, police found muddy, dark-colored clothing in appellant's bedroom and a pair of shoes outside of the residence.

During the investigation, police arrested Undra Gaines. He had the gun used in the robbery in his possession, a Rossi .38-caliber handgun. Gaines gave the gun to police and told police that it was a gun that he gave to appellant. A Pizza Hut employee identified the gun as the one used in the robbery. Police questioned appellant on March 23, 2005, and appellant confessed to the robbery. He told police that he was watching the Pizza Hut that evening and that there was a deputy car parked nearby. Appellant stated that he robbed the Pizza Hut after the deputies left. Appellant also told police that after he robbed the Pizza Hut, he gave the gun, a snub-nosed .38 Rossi, to Gaines.

Appellant made no directed-verdict motion and rested without presenting a case. He requested an instruction on simple robbery, but the court rejected the instruction, stating that no one disputed whether a weapon was used in the robbery. After deliberations, the jury found appellant guilty of aggravated robbery and sentenced him to a fifteen-year term in the Arkansas Department of Correction.

An attorney's request to withdraw from appellate representation based upon a meritless appeal must be accompanied by a brief that contains a list of all rulings adverse to his client that were made on any objection, motion, or request made by either party. *Eads v. State*, 74

Ark. App. 363, 47 S.W.3d 918 (2001). The argument section of the brief must contain an explanation of why each adverse ruling is not a meritorious ground for reversal. *Id.* This court is bound to perform a full examination of the proceedings as a whole to decide if an appeal would be wholly frivolous. *Campbell v. State*, 74 Ark. App. 277, 47 S.W.3d 915 (2001). If counsel fails to address all possible grounds for reversal, this court can deny the motion to withdraw and order rebriefing. *Sweeney v. State*, 69 Ark. App. 7, 9 S.W.3d 529 (2000).

The record contains three adverse rulings.¹ First, during the cross-examination of one of the officers, appellant's counsel asked the officer from whom did he receive the gun. The officer replied that he received the gun from Undra Gaines. Counsel then asked if the officer had received the gun from Childs, to which the State objected, arguing that the question was asked and answered. The court sustained the objection. As noted by counsel in his brief, the question had indeed been asked and answered, and there was no other evidence suggesting that the officer received the gun from anyone other than Undra Gaines. No meritorious argument for reversal could be made on this point.

Second, appellant objected when Hildreth testified that Childs brought him the mask and opined that her son was involved in the robbery. Appellant argued that the testimony was hearsay, but the court overruled the objection and instructed the jury that it could not consider the truth of the matter set forth in the hearsay statement. The court further

¹Because appellant made no directed-verdict motion, any challenge to the sufficiency of the evidence is not preserved. *See* Ark. R. Crim. P. 33.1. Therefore, we do not discuss the sufficiency of the evidence here.

explained that the testimony was merely to show how Hildreth became involved in the investigation. As explained by counsel, the court instructed the jury that it was not to consider the truth of the matter asserted. *See also* Ark. R. Evid. 801(c) (defining hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted”); Ark. R. Evid. 802 (providing that hearsay is inadmissible except as provided by other rules of evidence). We do not reverse a trial court’s ruling on a hearsay objection absent an abuse of discretion. *Hawkins v. State*, 348 Ark. 384, 72 S.W.3d 493 (2002). Given that the court explicitly instructed the jury not to consider the statement for the truth of the matter asserted and that the testimony showed how the Warren Police Department became involved in the case, the trial court did not abuse its discretion in overruling the hearsay objection.

Finally, appellant proffered an instruction for robbery as a lesser-included offense of aggravated robbery. The trial court refused to give the instruction, finding that no one disputed that the robber used a gun. It is reversible error to refuse to instruct on a lesser-included offense when there is the slightest evidence to support the instruction. *Whittier v. State*, 84 Ark. App. 362, 141 S.W.3d 924 (2004). However, it is not error for the court to refuse or fail to instruct on the lesser offense where the evidence clearly shows that the defendant is either guilty of the greater offense charged or innocent. *Taylor v. State*, 77 Ark. App. 144, 72 S.W.3d 882 (2002). Here, as the trial court ruled, no one disputed the use of a gun in the aggravated robbery. *See also* Ark. Code Ann. § 5-12-103(a)(1) (Repl. 2006) (stating that a person commits aggravated robbery if the person commits robbery and is armed with a deadly weapon). The only issue here was the identity of the assailant. Either appellant

was guilty of aggravated robbery or he was innocent of any crime involving the robbery of the Pizza Hut. No meritorious appeal could result from the trial court refusing an instruction on the lesser-included offense of robbery.

A review of the record shows no other rulings adverse to appellant. Counsel has submitted a brief that complies with the requirements of *Anders* and Ark. Sup. Ct. R. 4-3(j). Accordingly, we affirm appellant's conviction and grant counsel's motion to withdraw.

Affirmed; motion to withdraw granted.

HART and GLOVER, JJ., agree.